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In the

Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted] 193

THORNTON G. DEWEY,

Petitioner,

v.

THE AMERICAN NATIONAL BANK, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT AMARILLO, TEXAS

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In the

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OCTOBER TERM, 1965

No. 7375

THORNTON G. DEWEY,

Petitioner,

v.

THE AMERICAN NATIONAL BANK, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT AMARILLO, TEXAS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, Texas, which became final on February 10, 1965.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas is reported in Volume 382 S.W. 2d, p. 524, and is set out in full in Appendix A hereof, infra, p. A-1.

The action of the Supreme Court of Texas in refusing the application for writ of error to that Court, "Writ Refused, No Reversible Error", was without written opinion, and the certificate of the Clerk of that Court of such action is printed in Appendix C hereof, infra, p. A-19. The action of the Supreme Court of Texas in overruling the motion for re-hearing was likewise without written opinion, and the certificate of the action of such court is also printed in Appendix C hereof.

JURISDICTION

The judgment of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, entered June 15, 1964 (set out herein verbatim in Appendix G, p. A-23 hereof), became final on February 10, 1965, the date the Supreme Court of Texas overruled Petitioner's motion for rehearing to that Court. (Appendix C, p. A-19 hereof).

The jurisdiction of this Court is invoked under 28 USC Section 1257 (3), petitioner having set up and claimed a right to recover double usurious interest paid under a Statute of the United States (12 USCA 85 and 86), and equivalent statutes of the State of Texas (Articles 5069, 5071, and 5073, Vernon's Annotated Civil Statutes) passed under the authority of and governed by the Federal statutes.

QUESTIONS PRESENTED

1. Is the repayment of $100,000.00 plus interest at the rate of 10% per annum for a loan of $94,500.00 usurious?
2. Is a lender who is actually an agent for an undisclosed principal entitled to retain a commission for himself in

addition to the maximum rate of interest which he has reserved for his undisclosed principal, without this commission being considered as additional interest?

3. Is a salaried vice-president of a National Bank entitled to make loans for individual depositors while acting in his capacity of such vice-president, and take a commission for himself from the borrower?

4. Is an undisclosed principal liable for double usurious interest collected by his agent, with knowledge of the principal but without his participating in the commission taken by his agent above the legal rate?

5. Is a National Bank liable for the act of its duly authorized vice-president in making a loan of a depositor's funds at the maximum legal rate, and then taking a commission for himself so as to run the total rate of interest beyond the statutory 10% maximum?

STATUTES INVOLVED

The Federal statutory provisions involved are 12 USCA 85, Appendix K hereof (p. A-25 infra), providing the maximum rate of interest allowed to be charged by national banks, 12 USCA 86, Appendix L hereof (p. A-26 infra), allowing the recovery of twice the amount of usurious interest paid to a national bank, and 12 USCA 220, Appendix M hereof (p. A-27 infra), forbidding bribery and graft.

The Texas statutes involved are Article 5069, Vernon's Annotated Civil Statutes, Appendix H hereof (p. A-24 infra), Article 5071, Vernon's Annotated Civil Statutes, Ap-

pendix I hereof (p. A-24 infra), and Article 5073, Vernon's Annotated Civil Statutes, Appendix J hereof (p. A-25 infra).

STATEMENT OF CASE

This is a usury case. The facts are not in dispute.

Petitioner Dewey brought suit against respondents the lender, Derrell Henry, vice-president of defendant American National Bank; the Bank; and W. D. Owen, a depositor of defendant Bank whose money Henry used to make the loan to Petitioner Dewey, for recovery of double usurious interest paid by him to defendant Henry.

Dewey borrowed $100,000.00 from defendant Henry while Henry was at his desk as a vice-president of defendant Bank, executing to Henry his, Dewey's, note for $100,000.00 with 10% interest per annum. Henry retained for himself the sum of $5,000.00 as a "commission" or gratuity for having "found" the lender, Owen, and in exchange for his note for $100,000.00, Dewey received the sum of $94,500.00. Thereafter Dewey repaid the entire $100,000.00 along with 10% interest per annum on the whole amount, he never having had but $94,500.00 on which interest could accrue.

Henry and Owen had agreed that they would not tell Dewey whose money he was borrowing, and Henry did not tell him. Henry, as vice-president of the Bank, lent Owen's account $60,000.00 so Owen's account would have enough money in it to take out the whole $100,000.00. Other than the fact that Henry had full authority to lend more than $100,000.00 to anyone he wanted to without asking any-

body, the Bank had no connection with the loan except to receive 5% interest on the $60,000.00 of its money which Henry had lent to Owen's account in order to make the loan. At no time did Owen appear, nor was his name mentioned in the transaction. It was handled entirely by Henry himself, and he took the note for $100,000.00 in the name of "Derrell Henry, Trustee". He purchased from the bank cashier's checks totalling $100,000.00, showing as purchaser "Derrell Henry, Trustee for Loan Account".

Petitioner based his right to recovery of the usurious interest paid by him plus a like amount as penalty on 12 USCA Sec. 86, as well as Article 5073 of the Revised Civil Statutes of Texas, as revealed by his second amended original petition upon which trial was had, and he has consistently claimed this right under both the Federal and State statutes. He claims that the $20,076.23 in interest which he paid is usurious, and that he is entitled to recover twice this amount, or $40,152.46, under the authority of both the Federal and State acts.

There was no dispute in the testimony, yet the trial court overruled plaintiff's motion for instructed verdict, motion for judgment non obstante veredicto, and motion for new trial.

The opinion of the Court of Civil Appeals did not discuss 18 of appellant's 24 points of error, contenting itself with deciding 6 of them, none of which dealt with the question of whether the loan was usurious or not. That decision has not yet been made, either by the trial court or the Court of Civil Appeals. (Appendix A, p. A-1 infra)

By the failure of both courts to make the decision of whether this loan was or was not usurious, Petitioner has been deprived of due process of law as guaranteed by both the United States Constitution (Appendix N) and the Constitution of the State of Texas (Appendix O)

REASONS FOR GRANTING THE WRIT

The collection of usurious interest is against public policy. This policy is declared by every state and the Federal Government in statutes setting maximum rates of interest and providing penalties for the collection of usury.

12 USCA 86 and Texas' Article 5073, RCS, both give the payor of usurious interest the right to sue and recover twice the amount of usurious interest paid, and the failure of the courts of Texas to decide the question which would determine Petitioner's right to recover is a deprivation of the right of property given him by these statutes without due process of law.

If the undisputed facts did not reveal usury, then the trial court should have instructed a verdict for the defendants Henry and Owen, as it did for the Bank on the theory that the Bank had not benefited from the transaction, though it did receive over $750.00 in interest during the first 90 days of the loan, from the $60,000.00 lent to Owen so that his account could furnish the money to make the loan.

On the other hand, if the undisputed facts did reveal usury, then a verdict should have been instructed for plaintiff, Petitioner here. The decision was the duty and respon-

sibility of the Court, not of the jury on undisputed evidence. Due process was therefore not observed in presenting to the jury questions which failed to determine any but matters of law, which should have been determined by the Court.

The failure of the Court of Civil Appeals to make the decision was also a denial of due process. This Court did not decide the questions presented to it, and the Supreme Court failed to rectify the errors of the Courts below by the use of the Texas rule of civil procedure which allows the Supreme Court to reject any case with the notation, "Refused. No Reversible Error". The denial of due process by the Court of Civil Appeals is therefore compounded and confirmed through inaction of the Supreme Court, and Petitioner is therefore deprived of a clear right given to him by both the Federal and State statutes.

The failure of the trial court and Court of Civil Appeals to apply the State and Federal statutes to an undisputed set of facts renders the usury statutes functus officio, and opens the door to any kind of subterfuge that can be conjured up by ingenious money-lenders to extract usurious interest. Further, to countenance the actions of a vice-president of a National Bank in taking for himself a gratuity in the face of a criminal statute forbidding it will weaken the National Banks Act to the point where the public can have no more confidence in the integrity of an officer of a National Bank than it has in any fly-by-night money-lender.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Harris E. Lofthus, Attorney for Petitioner herein, a member of the Bar of the State of Texas, hereby certify that on the 8 day of May, 1965, I personally delivered a copy of this application to the offices of the Attorneys of Record for Respondents as follows:

Mr. Harlow Sprouse
Underwood, Wilson, Sutton, Heare & Berry
Attorneys at Law
Vaughn Building
Amarillo, Texas
Attorney for Respondents
Derrell Henry and W. D. Owen

Mr. Richard L. Cazzell
Culton, Morgan, Britain & White
Attorneys at Law
American National Bank Building
Amarillo, Texas
Attorney for Respondent
The American National Bank.

Harris E Lofthus

Harris E. Lofthus

APPENDIX "A"
OPINION OF THE COURT OF CIVIL APPEALS
No. 7375

THORNTON G. DEWEY,

Appellant,

v.

AMERICAN NATIONAL BANK, et al.,

Appellees.

June 15, 1964

This suit was filed by Thornton G. Dewey under Article 5073 V.T.C.S. seeking to recover $40,152.46 allegedly due him on usurious interest and penalties growing out of a note executed by him bearing date of April 1, 1959, in the sum of $100,000 and bearing 10 per cent interest. Defendants-appellees are the American National Bank of Amarillo, Texas, Derrell Henry and W. D. Owen.

Prior to April 1, 1959, Dewey was seeking a loan of $100,000 for which he was prepared to pay 10 per cent interest. The security he had to offer was his undivided interest in land notes received from the sale of a section of land bought for subdivision purposes. The notes were non-interest bearing, had several payees, required partial releases when payments were made as lots were sold in the subdivision, had a provision suspending payments in the event of war and were not the type security for a "bankable loan."

The record shows he first contacted a man by the name of Grady Truett, identified as a loan broker, and sought his

help in securing the loan. Mr. Truett took Mr. Dewey to talk with two potential lenders, one of whom was appellee, Owen. Neither of these efforts resulted in the consummation of the loan.

After Mr. Truett's efforts to secure the loan for appellant did not materialize, Dewey came in contact with appellee, Derrell Henry. As to which one initiated the contact the record is in dispute. Appellant contends Henry first called him by telephone and told him if he would come by the American National Bank he would help him secure the loan. Mr. Henry testified the first contact he had with Mr. Dewey concerning the loan was when he came into the bank seeking it.

It is uncontradicted that Henry subsequently influenced appellee Owen to make the loan and that before the loan was finally consummated, appellant agreed to terms whereby he would borrow the $100,000 at 10 per cent per annum interest, that he would pay Henry a commission of $5,000 for securing the loan and would pay the expenses incident to the closing thereof, including attorney's fees.

Mr. Owen admitted that after he had first rejected the loan because it appeared too complex and undesirable for him to handle, that Mr. Henry later came to his home in an effort to convince him that the loan was safe, telling him the mortgagors on the security to be pledged were highly reliable, financially sound men, and assuring him that he

would personally service the loan for him without expense. He also testified he and Mr. Henry were friends, that he knew Mr. Henry was getting a commission for making the loan and that fact might have had a minor influence on his final decision to make it.

Based on the advice of Mr. Owen's attorney, W. M. Sutton, the note to be executed by appellant was to be made payable to Mr. Henry, Trustee, and it was not to be disclosed to Mr. Dewey or anyone else who was actually furnishing the money for the loan or who the beneficial owner of the security would be. Mr. Sutton gave as his reason for such advice the fact that someone would have to be available to execute the partial releases on the lots in the subdivision representing the security and that a purchaser of any of such property could rely upon a release from a trustee without the necessity of determining the authority of the trustee to execute the relases only if the beneficiary was not disclosed.

Mr. Sutton required an abstract of title to be brought to him for examination on the property securing the notes pledged to the payment of the $100,000 loan. After it had been examined and the necessary papers prepared, Mr. Henry and appellant went to Mr. Sutton's office, where the $100,000 note was signed. Though appellant testified he supposed the money he was getting was bank money he admitted that "I still don't think it's a bankable loan."

Mr. Owen did not have sufficient cash in the bank at the time to make the loan because "he had his money at work" but he made arrangements with the bank before he left for Tucson for a $60,000 loan and authorized Mr. Henry to distribute the funds when Mr. Sutton approved everything involved in the transaction in the event the transaction was consummated. The testimony shows he had done business with the American National Bank for many years and it is without question in the record that Mr. Owen was a man so materially circumstanced that a loan of that size made to him involved no risk whatever to the bank. The loan provided 5 per cent interest, which was the going rate for that type loan, and it was repaid in a few months after Mr. Owen withdrew some money he had in a loan association and in stocks.

When the loan to appellant was ready for closing Mr. Owen's account was charged with $100,000, a cashier's check was purchased in that amount payable to Dewey and endorsed by him. After endorsement, it was exchanged for three cashier's checks, one to appellant for $94,500, one to Henry for $5,000 and one to Underwood, Wilson, Sutton, Heare & Berry, Attorneys, for $500. Mr. Dewey paid the 10 per cent interest on the $100,000 borrowed until the debt was retired then filed this suit contending the $94,500 item was all upon which he was obligated to pay interest.

The record shows that on the same day Mr. Henry deposited to W. D. Owen's account the $5,000 fee he had received but it is without dispute in the testimony that he

had borrowed that amount from Mr. Owen a few months previous in order that he could clear some bank stock so as to qualify himself as a director of the bank. There is not anything whatever in the record above innuendoes to suggest that Mr. Henry did not earn and was not paid the $5,000 as a broker's commission. No issue was requested or given asking if Mr. Owen benefited any from the Henry commission. The question was asked Mr. Dewey on cross examination if he ever agreed to pay Mr. Henry a $5,000 commission. He answered: "Well, for my actions in signing the check, I did, yes." A pleading sworn to by Dewey was introduced into evidence which alleged:

> "That upon said occasion, Plaintiff and Defendant Derrell Henry agreed to the terms of the loan whereby Plaintiff Dewey would borrow the sum of $100,000 at 10 per cent per annum interest, paying to Defendant Derrell Henry a commission in the amount of $5,000 upon said loan, and paying also the expenses incurred in making such loan;"

The jury found that Mr. Henry was acting as an agent for Mr. Dewey in processing the loan and there is sufficient evidence to support the finding. They also found that Mr. Owen did not require the payment of a commission of $5,000 to Mr. Henry and there is sufficient probative evidence to support that finding.

There is not anything in the record beyond innuendoes showing that appellee bank had anything whatever to do with the $100,000 loan except it loaned Mr. Owen, a customer, $60,000 which he used in making the Dewey loan. That transaction, as shown by this record, was perfectly

legitimate and the testimony is uncontradicted that the bank did not receive any interest whatever from the Dewey loan.

Appellant tendered a trial amendment alleging partnership, conspiracy and joint adventure between the three appellees. There is not any probative evidence in the record to support such pleading, so it was properly refused. Therefore, the trial court correctly instructed a verdict for the bank.

There is not any probative evidence in the case showing that Mr. Henry had any authority from Mr. Owen to make the loan other than as trustee after Mr. Owen and/or his attorney had approved the security, the rate of interest etc. It is uncontradicted that Mr. Owen received none of the broker's commission.

In Special Issue Number Two the court asked the jury if Derrell Henry acted as agent for Mr. W. D. Owen in procuring the loan in question and the jury answered affirmatively. Appellant now urges error of the court in refusing him a judgment based on the answer of the jury to said issue; yet, the record shows he objected to the court asking the question for the reason that it fails to cover any controlling issue in the case. We agree that it does not cover any controlling issue in the case, since it was not conditionally submitted in connection with other material issues, if any, raised by the pleadings and evidence. There is evidence showing that Mr. Henry was a procuring cause of Mr. Owen making the loan, because of convincing him that

the sureties on the notes pledged to the payment of the loan were dependable and because he promised to service it. However, from the record made here he was only a special and limited agent. The court defined an agent as "* * * one who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter," and there is not any probative testimony showing Mr. Henry as anything more than a special and limited agent of Mr. Owen.

Mr. Owen was asked by counsel for appellant who Henry was working for in the loan transaction and he replied: "He was working for Mr. Dewey as his agent in soliciting the loan.

> "Q. Didn't you consider that Derrell was working for you rather than somebody else?
>
> "A. No. sir. He certainly was not.
>
> * * * * *
>
> "Q. Well, in this particular transaction between him and between yourself and Mr. Dewey, was he your man or was he Mr. Dewey's man?
>
> "A. I think that he was definitely representing Mr. Dewey in securing this loan and, after he secured the loan, he acted as a trustee for both our interests."

Since Mr. Henry had no authority from Mr. Owen to make the loan, Mr. Owen received none of the commission, Mr. Dewey agreed to pay both the $500 processing fee to the law firm and the $5,000 brokerage fee to Mr. Henry, those fees so charged do not render the loan usurious. Under a closely analogous situation our court has specifically so held and the Supreme Court has agreed with us. *Noel v.*

Panhandle Building & Loan Ass'n, Tex. Civ, App. 1935, 85 S.W. 2d 773 (writ refused); *Nevels v. Harris*, 129 Tex. 193, 102 S.W. 2d 1046.

The case here presented is simply that of a borrower (Dewey) employing a broker (Henry), who has no regular or established connection with the lender (Owen) for the payment to the broker of compensation for his services to effect the loan. Therefore, the loans made by the lender cannot be tainted with usury by virtue of the "finder's fee" paid by the borrower (Dewey) to the loan broker acting for the borrower to effect the loan. Great Southern Life Ins. Co. v. Williams, Tex. Civ. App. 1939, 135 S.W. 2d 241 (dismissed, judgment correct).

Appellant tendered numerous requested special issues which the court rejected. Even if some of them were proper issues to be submitted, a question we do not find it necessary here to pass on, there is no error shown. They were tendered en masse.

Where more than one issue is embraced in a single request, the trial judge in determining whether a particular issue should be given or refused, etc., must consider whether all others should be given or refused, etc., else he must rewrite them in order to make the required separation and proper endorsement of his action on each if one or more of the issues should not have been given. Therefore, when one or more of the special en masse issues should not have been given, the trial court is justified in refusing to give any of them. *Texas General Indemnity Co. v. McNeill*, Tex. Civ.

App. 1953, 261 S.W. 2d 378 (N.W.H.); *Walton v. West Texas Utilities Co.*, Tex. Civ. App. 1942, 161 S.W. 2d 518 (ref. wm).

Clearly some of the en masse issues should not have been given. Some were duplications of issues given.

"It is well settled that special issues are to be submitted separately and distinctly and not generally or in groups or combinations." *Thompson v. Robbins*, 157 Tex. 463, 304 S.W. 2d 111. We believe what we have said completely disposes of all legitimate points raised by appellant, many of which were repetitious. All purported points not specifically mentioned are hereby overruled and the judgment of the trial court is in all things affirmed.

Alton B. Chapman, Associate Justice

APPENDIX "B"

Petitioner's Motion for Rehearing Filed in the Supreme Court of Texas

To the Honorable Supreme Court of Texas:

Comes now Petitioner THORNTON G. DEWEY, and respectfully moves the Court to reconsider its action taken in this cause on January 13, 1965, by which Petitioner's application for writ of error was N.R.E.'d by this Court, and to grant Petitioner's said application, and as grounds therefor Petitioner would show to the Court the following:

It is finally apparent to Petitioner that he has been completely successful in only one respect in this case, and that is in causing confusion in the minds of all three courts which have considered the matter.

Petitioner's first mistake was, obviously, in joining as defendants the bank of which the lender, HENRY, was a vice-president, and Owen, the depositor whose account was used to accomplish this loan and who ultimately got the interest paid by Petitioner, as well as the $5,000.00 paid by him to HENRY.

Laying aside for the moment, therefore, the fact that there are other defendants in this cause, let us consider only defendant Derrell Henry, and see whether there is any reason why Petitioner, as plaintiff, should not have had a judgment against him alone for double the amount of the usurious interest paid.

If HENRY wants to call himself a loan broker, let us take him out of his vice-president's chair in the bank and make him a loan broker, though he says he never had another transaction like this before or since, and from there on use the facts exactly as they unfolded in this case.

There were only two parties to this transaction, Petitioner Dewey and defendant-Respondent Henry. Henry and Owen, the depositor, had agreed between themselves, so they said, to keep secret from Dewey the fact that it was Owen's money that Dewey was borrowing, so Owen's name was never mentioned. Dewey gave Henry his, Dewey's, promissory note in the amount of $100,000.00, repayable on or before 5 years, along with 10% interest per annum. This note was payable to Henry. The security was taken by Henry in his own name, and the payments were made to Henry, who computed the interest and applied the proper amounts to principal after deducting his 10% interest. Had Dewey failed to pay as agreed, the cause of action for non-payment and foreclosure would have belonged to Henry, and no one else.

At the time the note was given by Dewey to Henry, Henry deducted the sum of $5,000.00 from the proceeds of the note, and put it in his pocket, and immediately thereafter used it to pay back a note in the same amount that he owed to Owen. Dewey left Henry's office with $94,500.00, the balance of $500.00 having been used to pay the attorneys who handled the transaction for Henry, and about which no complaint has been made on Dewey's behalf: that was a legitimate expense. Thereafter, Dewey repaid

the entire $100,000.00 to Henry and his assignee (who just happened to be Owen), along with 10% interest on the full amount, but never having had the use of the full amount. The definition of interest being a charge for the use, forbearance, or detention of money based upon the time it is withheld, it is obvious that this $5,000.00 could never have accrued any interest at all, because it was never withheld for *any* length of time, yet interest was paid on it during the whole time until the loan was finally fully paid off, *in addition to* the 10% interest paid on the amount actually lent by Henry to Dewey.

Now, the question is, can a broker who is also a lender charge the maximum rate of 10% as interest, and an additional sum as a commission for making the loan, paid to himself? The answer to that question is obvious: of course he could not. One of the grounds on which Petitioner requests review of this decision is conflict with decisions of other Courts of Civil Appeals. Since this application for writ of error was submitted to the Supreme Court, the Fort Worth Court of Civil Appeals has provided another instance of such conflict with its decision in the case of *Kollman v. Hunnicutt*, No. 16580 on the docket of that Court, rendered on December 4, 1964, and as yet unreported in the advance sheets, wherein Chief Justice Frank A. Massey wrote that charges "intended as compensation for the risk, trouble, and expenses involved — are to be treated as constituting part of the expenses incurred in making or carrying a loan, for which a lawfully charged rate is itself to be considered as providing adequate compensation", citing authorities.

Had the case at bar been submitted to the Fort Worth Court, it is certain that the same principle enunciated in the Kollman case would have been applied, and the question of what was interest and what was principal would have been decided directly, as Justice Massey did in saying,

> "If the $2,335.00 was interest there is no doubt that it was usurious interest, since it exceeded 10% as applied to what would be the principal."

This is a direct answer to the question which Petitioner has not yet been able to get any court to decide in this case. Expert mathematical testimony was presented in this case showing that the rate of interest charged by Henry was 14.425%, but this computation has not been noticed by the Court of Civil Appeals.

As a lone loan broker, then, Henry would as the sole defendant clearly have been liable to Dewey for twice the amount of usurious interest paid by Dewey to him, Henry.

The question may arise, could Henry defend on the ground that he was only acting as vice-president of the Bank? Clearly not; his act in accepting a gratuity for himself in a transaction for the bank is condemned as a felony by *18 USCA 220,* and it is elementary that one cannot defend on the ground that he was busy committing a felony and therefore cannot be held civilly liable for the consequences of his act.

The further question then suggests itself, could he defend on the ground that he was merely an agent for an undisclosed principal? Authorities presented by Petitioner

clearly show that one who acts as an agent but without divulging the identity of his principal is himself personally liable for what he does.

The facts being undisputed, as they are, and Henry being unable to assert immunity as above shown, it is difficult for Petitioner to understand why he should be denied judgment against Henry, had he been sued alone. Should Petitioner then be held to have foreclosed himself from obtaining judgment against Henry, just because the Bank and Owen were joined as defendants? Had it not been for the fact that a judgment would be collectible from either the Bank or Owen, but not from Henry, as the record amply shows, suit would have been brought against Henry alone, and confusion thereby avoided. With no defenses, judgment would have been rendered against Henry and in favor of Petitioner Dewey, as it should now be.

Here appears another error made by Petitioner, not of law nor procedure, but of strategy. For the purpose of a clearer understanding of the foregoing, let us assume that Dewey brought his action against Henry alone, alleging only that, in exchange for his note for $100,000.00 bearing 10% interest per annum, he, Dewey, received from Henry the sum of $94,500.00, and thereafter repaid to Henry $100,000.00 as called for by the note, along with the full 10% interest per annum thereon. Could it then be doubted that usurious interest had been collected? Simple arithmetic says that there could be no doubt. What, then, would Henry's defense have been? Could he hide behind the fact that he had paid the interest over to Owen? This defense

would be inadmissible as immaterial, of course, he having failed to disclose the identity of his principal to the borrower and thereby become personally liable. All he could do would be to plead over against Owen, in case he, Henry, were held to account to plaintiff for the collection of such usurious interest.

Care should be taken not to confuse this state of facts with the ordinary and customary "bank discount" practice which, though patently usurious on occasion, has been and probably will continue to be countenanced as a practice so widespread and universal that any attempt to tamper with it or penalize it under the usury laws would probably bring down the whole financial structure of the country. There is no evidence in this record whatever to indicate that this situation bears any relation to the discount practice. This was not a banking transaction, or at least the trial court and Defendant Henry said it wasn't, and no interest was computed in advance and deducted from the proceeds of the note in the customary manner of a bank "discounting" a note. Petitioner has contended that anything done by Henry was done by the Bank, as he was unquestionably authorized to bind the bank by his actions; but, as Henry said, he was acting independently of the Bank, and the transaction was therefore one of a private lender lending what were ostensibly his own funds at the maximum rate of interest, and taking for himself in addition thereto a "commission" or gratuity in violation of the Federal criminal law as well as both the State and Federal laws governing the exaction of usurious interest, and then proceeded to

actually lend less money than the note called for and upon which interest would have to be paid at the maximum allowable rate of 10% per annum. Actually, it is a matter of small importance what happened to the $5,000.00, or whether it ever existed; the fact remains that interest could only accrue on $94,500.00, yet the maximum rate of 10% per annum was collected on $100,000.00, which figures out to 14.425% interest per annum.

Another and more common type of usury case is also to be distinguished from this one. That is the case where a man sets himself up as a genuine loan broker, obtaining loans on property through any one of a number of loan companies, applications for all of which he keeps in his desk drawer with the companies' names on them. It is wonderful the confusion that has been injected into this case by Respondents insisting that it is governed by that type of loan-broker case, where the borrower makes out an application to a building and loan association or insurance company for a loan which, if approved, results in a 2% commission to the broker. The real difference between those cases and the one at bar is that in that type, the prospective borrower knows which company he is making application to, and is not led to believe that the broker is lending anything but assistance in making out the application and shepherding the loan through for the borrower, upon completion of which the broker is paid his commission by the borrower. The note signed by the borrower is always payable to the loan company, in its own name, the security taken in its name, its identity being known to the

borrower from the start. In the case at bar, on the other hand, Henry was, so far as it appeared, both broker and lender, taking the note and security in his own name and collecting the payments in the same manner as well as the "commission" for making the loan.

Allowing this opinion of the Court of Civil Appeals to stand will put a premium on cleverness, something no Texas court has ever done in the usury field. The authorities have heretofore been unanimous in stating that the courts will look through the form to the substance of the transaction, and if usury appears, it will be struck down. Justice Massey in the Fort Worth case of *Kollman v. Hunnicutt*, hereinbefore referred to, quoted from *Jackson v. Cassidy*, 4 S.W. 541, in part,

> "Having the full effect of a loan, it must be treated as such, considered in reference to our usury laws, otherwise the few features of the transaction which give it a different appearance would furnish a device by which these laws might be evaded altogether".

Petitioner is hard put to find any features of the transaction in question here which give it an appearance of other than a usurious one, but Respondents have been eminently successful up to this point in utilizing what features there are to "evade the usury laws altogether", contrary to the public policy of the State as expressed in all previous opinions of our courts.

WHEREFORE, Premises considered, Petitioner prays that his application for writ of error be granted, and that the judgments of the trial court and the Court of Civil Ap-

peals be reversed, and judgment here rendered for Petitioner; or, in the alternative, that this cause be remanded to the trial court for further proceedings, all as prayed for in his said application for writ of error.

Respectfully submitted,

HARRIS E. LOFTHUS

Attorney for Petitioner.

CERTIFICATE

I CERTIFY that I have this the .... day of January, 1965, delivered true copies of this motion for re-hearing to the offices of Mr. Richard L. Cazzell, Attorney for Respondent American National Bank, and Mr. Harlow Sprouse, Attorney for Respondents Owen and Henry, both in Amarillo, Texas.

Harris E. Lofthus

APPENDIX "C"

In the Supreme Court of Texas

No. A-10,462 January 13, 1965

THORNTON G. DEWEY,

v.

AMERICAN NATIONAL BANK, et al.,

From Potter County, Seventh District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Seventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Thornton G. Dewey, pay all costs incurred on this application.

No. A-10,462 February 10, 1965

THORNTON G. DEWEY,

v.

THE AMERICAN NATIONAL BANK, et al.,

From Potter County, Seventh District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and

correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the Seal of the Supreme Court of Texas, at the City of Austin, this, the 15th day of February, 1965.

GEO. H. TEMPLIN, Clerk

By Jewel Seeliger, Deputy.

THE STATE OF TEXAS }
COUNTY OF POTTER }

I, ELMO PAYNE, Clerk of the Court of Civil Appeals for the 7th Supreme Judicial District of Texas, at Amarillo, hereby certify the foregoing to be a true and correct copy of the judgment of the Supreme Court of Texas and the order on the motion for rehearing, as the same appears now on file and of record in my office.

In testimony whereof witness my hand and the seal of this Court this the 5th day of May A.D. 1965.

/s/ ELMO PAYNE

Clerk.

APPENDIX "D"

Rules of Civil Procedure
of the State of Texas

RULE 451:

"The Courts of Civil Appeals shall decide all issues presented to them by proper assignments of error by either party, whether such issues be of fact or of law, and announce in writing their conclusions."

APPENDIX "E"

Rules of Civil Procedure
of the State of Texas

RULE 453:

"Conclusions of fact and law upon each material point assigned as error in the Court of Civil Appeals shall be made and filed within thirty days after the decision of the case, if the case be one in which the Supreme Court has jurisdiction of an application for writ of error. The evidence need not be stated, except when necessary to determine the correctness of some ruling of the court. Such findings of fact and conclusions of law may be included in the opinion."

APPENDIX "F"

Rules of Civil Procedure of the State of Texas

RULE 455:

"If either party to a case, decided by a Court of Civil Appeals, shall be of the opinion that the findings of fact are insufficient upon any material issue assigned in that court as error, such party may, in his motion for rehearing, specify the point upon which there is no finding of fact, or upon which the finding made by the court is insufficient, and ask said court to make and file conclusions of fact upon the points indicated in the motion. If the court refuses to make such findings, or if the finding made be insufficient, such action may be assigned as error in application to the Supreme Court for writ of error."

APPENDIX "G"

No. 7375 June 15, 1964

THORNTON G. DEWEY,
v.
AMERICAN NATIONAL BANK, et al.,
From District Court of Potter County
Opinion by Mr. Chapman, A. J.

This cause came on to be heard on the transcript of the record, and the same being inspected, and it appearing to the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellant, Thornton G. Dewey, pay all costs in this behalf expended, for which let execution issue, and this decision be certified below for observance.

THE STATE OF TEXAS }
COUNTY OF POTTER }

I, ELMO PAYNE, Clerk of the Court of Civil Appeals for the 7th Supreme Judicial District of Texas, at Amarillo, hereby certify the foregoing to be a true and correct copy of the judgment of this Court in the foregoing-styled and numbered cause, as the same appears of record in the Minutes of this Court.

In testimony whereof witness my hand and the seal of this Court this the 5th day of May A.D. 1965.

/s/ ELMO PAYNE
Clerk.

APPENDIX "H"

Revised Civil Statutes of the State of Texas

ARTICLE 5069: Definitions

"Interest" is the compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money: "legal interest" is that interest which is allowed by law when the parties to a contract have not agreed upon any particular rate of interest; and "conventional interest" is that interest which is agreed upon and fixed by the parties to a written contract, not to exceed ten per cent per annum. "Usury" is interest in excess of the amount allowed by law; all contracts for usury are contrary to public policy and shall be void.

APPENDIX "I"

Revised Civil Statutes of the State of Texas

ARTICLE 5071: Limit on Rate

The parties to any written contract may agree to and stipulate for any rate of interest not exceeding ten per cent per annum on the amount of the contract; and all written contracts whatsoever, which may in any way, directly or indirectly, provide for a greater rate of interest shall be void and of no effect for the amount or value of the interest only; but the principal sum of money or value of the contract may be received and recovered.

APPENDIX "J"

Revised Civil Statutes of the State of Texas

ARTICLE 5073: Action on Usurious Rate

Within two years after the time that a greater rate of interest than ten per cent shall have been received or collected upon any contract, the person paying the same or his legal representative may by an action of debt recover double the amount of such interest from the person, firm or corporation receiving the same. Such action shall be instituted in any court of this State having jurisdiction thereof, in the county of the defendant's residence, or in the county where such usurious interest shall have been received or collected, or where said contract has been entered into, or where the parties who paid the usurious interest resided when such contract was made.

APPENDIX "K"

United States Code Annotated

VOL. 12, Sec. 85 — Rate of Interest on Loans

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, * * *

APPENDIX "L"

United States Code Annotated

VOL. 12, Sec. 86 — Usurious Interest; penalty for taking —

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, that such action is commenced within two years from the time the usurious transaction occurred.

APPENDIX "M"

United States Code Annotated

VOL. 18, Sec. 220: — Receipt of Commissions or Gifts for Procuring Loans

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal Intermediate Credit Bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

APPENDIX "N"

Constitution of the United States
Amendment XIV

Section 1. — No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "O"

Constitution of the State of Texas
Article 1

Section 19. No citizen of this State shall be deprived of life, liberty, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.